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No. 05-259

Supreme Court, U.S.
FILED
OCT 3 1 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

BURLINGTON NORTHERN and SANTA FE RAILWAY CO.,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

This case does not present an appropriate vehicle for resolving the first question presented. Petitioner seeks a grant of certiorari to challenge the Sixth Circuit standard that retaliatory acts are unlawful under Title VII if those actions are "materially adverse" to the interests of the plaintiff. But in the courts below petitioner did not object to the jury instruction incorporating this very standard, and repeatedly filed briefs endorsing the materially-adverse standard.

This case is emphatically not an appropriate vehicle for deciding between the standards in the Sixth and Ninth Circuits. Petitioner clearly would lose under the Ninth Circuit standard, as it did under the Sixth Circuit standard. Petitioners have not demonstrated that the outcome of this dispute would be any different if this Court were to adopt the Fifth Circuit standard.

Petitioner overstates the extent of any inter-circuit conflict regarding what retaliatory actions are unlawful. There is no showing that the formulations used in the Sixth and Ninth Circuits differ significantly in practice. The *current* Eighth Circuit standard is that a retaliatory action is unlawful if it results in a "material employment disadvantage," which is impossible to distinguish from the Sixth Circuit materially-adverse standard. The Fifth Circuit's "ultimate employment decision" standard may lead in some cases to a result different from that under the standard in the other eleven circuits, but there is no showing that there is any conflict between the Fifth and Sixth Circuits regarding the correct outcome in *this* case.

Every federal circuit to address the issue has concluded that the appropriate standard of proof for punitive damages under Title VII is proof by a preponderance of the

evidence, as has the Colorado Supreme Court. Five federal courts of appeals have included that standard in their pattern jury instructions. The fact that some states have, by statute or caselaw, adopted a different standard for punitive damages under *state* law does not create any conflict regarding the correct interpretation of Title VII. Consideration of this issue in the instant case would be premature. No award of punitive damages has yet been made; the court of appeals remanded this issue to the district court, which must first decide whether a retrial regarding punitive damages should be held at all.

STATEMENT OF THE CASE

The events giving rise to this action concern employees who work in or operate out of the Tennessee Yard facility of the Burlington Northern Santa Fe Railroad ("BNSF"). In the spring of 1997, a change in the BNSF methods for distributing supplies created a need for a forklift operator at the Tennessee Yard. BNSF initially assigned that work to Ralph Ellis, who appears to have been the only worker then at the Yard who was qualified to operate a forklift. (III Tr. 542). Ellis, however, was classified as a member of the mobile track gang, a position which entitled him to a special per diem allotment of approximately $200 a week. (II Tr. 393; III Tr. 503, 518). When BNSF required Ellis to give up that per diem if he was to remain as the forklift operator, Ellis opted to return to the better paid mobile track gang. (III Tr. 503, 508; Pet. App. 3a).

Ellis' decision created the need for a new forklift operator. At about the same time, respondent White was among the applicants for work at BNSF. White had substantial prior experience as a forklift operator, and BNSF

officials during her interview expressed considerable interest in that qualification. (I Tr. 73-77, 81-82; III Tr. 503, 597; Pet. App. 3a). The BNSF interviewers advised White that they would "call [her] for the forklift operator because [she] had experience in that." (I Tr. 83). White was hired by BNSF in June 1997, and was immediately assigned to operate the forklift.

Because the forklift position was a new one, there was no such job classification under the applicable collective bargaining agreement. White was placed in the general classification "track laborer." But White's job was quite different from the work of the other employees in that classification. White spent most of her day operating the forklift; the rest of her time was devoted primarily to cleaning up in the tool building and distributing supplies. (I Tr. 86-88). When, several months later, White was reassigned to track laborer duties, White testified she "ha[d] never experienced working on the railroad tracks." (I Tr. 119).[1]

The work done by regular track laborers was far less desirable than White's duties. Track laborers repaired damaged tracks and performed a variety of dirty and physically demanding tasks. (I Tr. 127; II Tr. 407-08, 418; Pet. App. 4a, 107a). "[T]rack laborers must carry heavy objects (e.g., heavy, cumbersome jacks that weigh approximately 110 pounds.)" (Order Denying Defendant's

[1] The petition states that "in her role as track laborer, [White] spent a majority of her time working outside in the rail yard." (Pet. 4). The testimony in question, however, makes no mention of the rail yard, and does not purport to be a description of working as a track laborer. Rather, White was simply explaining that the use of the forklift to unload trucks occurred outside. "[I was u]nloading trucks, placing items in a bin where it needs to go, whatever needed done outside." (I Tr. 99).

Motion for Summary Judgment, p. 14). The track laborers themselves characterized the forklift job as more desirable, "easier," and a "soft" position. (II Tr. 406; III Tr. 534, 617). The track laborers, all of whom were men, and none of whom were qualified to operate a forklift, complained that a woman had gotten that job. (II Tr. 406, 432). Just as White did not perform (at least most of) the duties done by track laborers, none of the track laborers ever operated the forklift.

On September 16, 1997, White filed an internal complaint of sexual harassment and discrimination by her foreman, Bill Joiner. On September 26, 1997, BNSF suspended Joiner for ten days and ordered him to attend training regarding sexual harassment. On the same day, Marvin Brown, the supervisor who oversaw the work of both White and Joiner, transferred White from the position of forklift operator to regular track laborer. To fill the resulting forklift operator vacancy, Brown then transferred Ellis back from mobile track gang to the forklift position which he had opted to leave only a few months earlier, even though doing so meant that BNSF then paid Ellis the additional $200 weekly per diem that it had not paid to pay White. (III Tr. 536-37).

White contended that the reassignment to track laborer work was in retaliation for her sexual harassment complaint. BNSF officials gave a series of conflicting explanations for this adverse action. First, at the time when Brown told White of the reassignment, he explained that he had taken that action because he was going to either phase out the forklift operator work or put the position of forklift operator up for bid among all the employees. (I Tr. 141). Brown in fact did neither. (III Tr. 539). Second, in response to White's EEOC charge, Brown

gave the EEOC a sworn statement that he had removed White in response to a complaint from the union Chairman. (III Tr. 532). However, the union Chairman denied having made such a complaint (II Tr. 340-41; Pet. App. 5a); at trial Brown both asserted there had been such a complaint and admitted that there had not. (III Tr. 520, 524, 530-31). Third, in a response to a pre-trial interrogatory, BNSF stated that it had reassigned White because her position was claimed by a more senior employee. (III Tr. 530; Pet. App. 5a). But Ellis, who was assigned the job in White's place, denied he had asked for it (III Tr. 660; Pet. App. 5a), and Brown admitted that assignment to the forklift job was not governed by seniority at all. (III Tr. 523-24, 546-47, 641). Fourth, at trial Brown testified he had replaced White because he had received complaints from Ellis and a senior track laborer that White held the forklift job despite the fact that she was less senior than male workers. (III Tr. 520-21, 526; Pet. App. 5a). But Ellis insisted he had not complained (III Tr. 659), and none of the track laborers (whatever their seniority) were qualified to operate the forklift. (III Tr. 542; Pet. App. 5a). Unsurprisingly, the jury concluded that BNSF had engaged in unlawful retaliation.

On December 4, 1997, White filed a charge with the EEOC alleging that BNSF had discriminated against her because of her gender. A week later, Brown retaliated by directing that White be "remove[d] from service." (I Tr. 153; IV Tr. 747; Pet. App. 5a). There was conflicting testimony about the nature of this disciplinary order. The union Chairman testified that this meant that White was fired, albeit with a right to appeal. (II Tr. 337 ("dismissed"), 348 ("discharged"), 355 ("dismissed.")) If White had not appealed this order within 15 days, her employment by BNSF would have permanently ended. (Pet. App.

6a). BNSF officials, on the other hand, asserted that in this instance "removal from service" meant only that White had been suspended pending an investigation. (III Tr. 446, 491, 513). The jury, of course, was entitled to credit the testimony favorable to White.

White filed a timely grievance. After White had been out of work for 37 days, union officials were able to persuade higher BNSF officials to overturn the dismissal order. BNSF agreed to permit White to return to work, and gave her back pay for the 37 days she had been jobless.

White filed additional charges with EEOC and subsequently commenced the instant action, asserting inter alia that the transfer and rescinded dismissal were imposed in retaliation for her objection to alleged acts of sexual harassment and discrimination.

Title VII only forbids retaliatory acts that are harmful to the interests of the victim. Prior to trial, BNSF unsuccessfully moved for judgment as a matter of law on the ground that the retaliatory acts in this case were not serious enough to be adverse and thus unlawful. The district judge rejected that motion in light of the particular factual circumstances of this case. Regarding the removal of White from the forklift position, the judge concluded

> that the tremendous variation of assignments within the job classification means that we can't just look at the job classification to determine whether or not there was a change for her – in the conditions of her employment, and we can look at exactly what she was doing and not doing. . . . [The] pretty graphic distinctions within the range of assignments available and the fact that she went from, no question, an easy job to, I think without much doubt, the most difficult and

> dirtiest job within the range of jobs available in that classification [are] enough to allow this to go to the jury.[2]

Although BNSF had ultimately rescinded the decision to fire White, and had given her back pay for the period she was out of work, the district court concluded that was insufficient to undo the injuries suffered during the period when the dismissal decision was in effect.

> Did she get everything back if somebody retaliated against her based on protected activity? Absolutely not. She had Christmas without – I mean do I have to really recite the record? I mean she had Christmas without income, without a job, with total insecurity. She was depressed. Her daughter . . . says her mom was lethargic, just hardly the same person as she had been in the summer. So, you know, money is often the least of the damage inflicted in these types of cases. . . .[3]

The jury found for White on her retaliation claim, and awarded $43,250 in compensatory damages, including $3250 in medical expenses. The district judge subsequently denied on similar grounds BNSF's post-trial motion for judgment as a matter of law. (Pet. App. 118a-119a).

On appeal a majority of the panel that first heard this case concluded that the retaliatory acts were not sufficiently serious to be materially adverse and thus were not actionable under Title VII. (Pet. App. 84a-104a). After reconsidering that issue en banc, however, every member of the Sixth Circuit concluded that those retaliatory

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[2] Tr. 703-04.

[3] Tr. 706.

actions were sufficiently significant to be adverse and unlawful under Title VII. (Pet. App. 8a-25a, 35a, 50a). That conclusion was the result of a fact-bound evaluation of the particular circumstances of this case. In holding that the rescinded dismissal of White was an adverse and hence unlawful employment action, the Sixth Circuit relied in particular on the length of the period between the dismissal and the eventual rescission (Pet. App. 22a), the jury's undisputed[4] finding that the retaliation had caused White more than $43,000 in damages and medical bills (Pet. App. 23a), the fact that the initial dismissal was overturned only because White had filed a grievance (Pet. App. 24a), and the absence of the special considerations that exist in cases involving tenure denials. (Pet. App. 22a-23a n.7).

The en banc court took a similar fact-bound approach to the removal of White from the forklift position, stressing that the forklift job "required more qualifications, which is an indication of prestige," that the standard track laborer job was "by all accounts more arduous and 'dirtier,'" and the fact that the forklift job was regarded by other workers as so much a "better job [that] male employees resented White for occupying it." (Pet. App. 25a). Far from announcing any general rule that transfers are always sufficiently serious to constitute adverse employment actions, the Sixth Circuit held only that on the particular record before it "the reassignment was a demotion evidenced by 'indices . . . *unique to [the] particular situation.*'" (Pet. App. 25a) (quoting *Kocsis v. Multicare*

[4] In its appeal to the Sixth Circuit petitioner did not challenge the amount of the jury's award.

Mgmt. Inc., 97 F.3d 876, 886 (6th Cir. 1996) (emphasis added).

The Sixth Circuit also concluded that the district court had erred in instructing the jury that it could only award punitive damages if the plaintiff established by "clear and convincing evidence" that BNSF had acted with the requisite malice or reckless indifference. (Pet. App. 28a-33a). The court of appeals, however, did not hold that the district court on remand was required to hold a new trial on punitive damages. The Sixth Circuit further ruled that in the proceedings below the trial judge had made a second error (in this instance in favor of plaintiff) in holding that punitive damages could be awarded merely on a finding of intentional discrimination. Title VII requires a plaintiff seeking punitive damages to prove that the defendant acted with "malice or reckless indifference"; "this standard requires a plaintiff to prove more than merely intentional discrimination." (Pet. App. 33a). Having thus identified two errors in the jury instructions regarding punitive damages (one error favoring the defendant, the other error favoring the plaintiff), the appellate court remanded the case so that the trial judge could determine in the first instance whether plaintiff's evidence was sufficient – under the correct legal standard – to support a jury award of punitive damages. (Pet. App. 33a-34a). Only if the district judge on remand resolves that issue in favor of plaintiff will a trial on punitive damages be held.

ARGUMENT

I. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

A. PETITIONER DID NOT OBJECT IN THE COURTS BELOW TO THE "MATERIALLY-ADVERSE" STANDARD

The decision below held that the retaliatory acts that occurred in this case are actionable under Title VII because they constituted "materially adverse change[s] in the terms of [the plaintiff's] employment." (Pet. App. 10a). In this Court petitioner challenges the correctness of the materially-adverse standard, and urges this Court to grant review to decide whether to reject that standard and to adopt instead the "ultimate employment decision" standard.[5] In the lower courts, however, far from attacking the materially-adverse standard, counsel for petitioner repeatedly endorsed that very formulation, and argued instead that the particular facts of this case did not satisfy the materially-adverse standard. It is the well-founded practice of this Court to decline to consider questions not squarely advanced in the courts below.

In *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), the petitioner asked to Court to decide whether a municipality could be held liable under section 1983 for gross negligence in the training of its police. After that issue had

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[5] Petitioner also asserts that this Court should grant review to consider the Ninth Circuit's deterrence standard, which assertedly conflicts with the majority materially-adverse standard. But since petitioner would certainly lose under the Ninth Circuit standard, there seems no possibility petitioner would actually urge the Court to adopt that standard in place of the materially-adverse standard.

been fully briefed on the merits, the Court dismissed the writ as improvidently granted because the petitioner had failed, at trial or on appeal, to object to a jury instruction that embodied the very legal standard which it sought to challenge in this Court.

> We ordinarily will not decide questions not raised or litigated in the lower courts. See *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict."

480 U.S. at 259.

The instant petition presents precisely the problem that led to the dismissal of the writ in *Kibbe*. At the conclusion of the trial the district judge without objection instructed the jury to apply the materially-adverse standard:

> To establish the third element of her retaliation claim – the existence of an adverse employment action – . . . the plaintiff must show that she suffered a materially adverse change in the terms or conditions of employment because of the employer's actions.

(IV Tr. 772). The trial judge then proceeded, again without objection, to explain to the jury how it should evaluate whether there had been a materially adverse change.

> In determining whether the plaintiff suffered a materially adverse change in the terms or conditions of her employment, you may consider the following:

1. Whether there was termination of employment.
2. Whether there was demotion, evidenced by decrease in wage or salary.
3. Whether there was . . . some less distinguished title.
4. Whether there was a material loss of benefits.
5. Whether there were significantly diminished material responsibilities.
6. Other indications that might be unique to a particular situation.

(IV Tr. 772-73).

In the litigation in the courts below, petitioner repeatedly insisted that "materially adverse" is the proper standard for assessing whether retaliatory conduct is sufficiently serious to violate Title VII. In its July 2000 motion for summary judgment, petitioner argued:

> The factors in proving a *materially adverse* change in the terms of employment for a retaliation claim are the same as for a discrimination claim. Accordingly, plaintiff must prove that she suffered a wage or salary decrease, a less distinguished title, a loss of benefits, or significantly diminished material responsibilities to show that the change in job duties was a *materially adverse* change in the terms of her employment with BNSF.[6]

The district court denied the summary judgment motion, applying the materially-adverse standard advocated by

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[6] Memorandum in Support of Defendant's Motion for Summary Judgment, p. 13 (emphasis added).

petitioner.[7] In September 2000, following the jury verdict in favor of White, petitioner moved for judgment as a matter of law, again arguing only that the evidence before the jury was insufficient to prove "a materially adverse change."[8]

In the Sixth Circuit petitioner filed a series of briefs endorsing the materially-adverse standard. In its first appellate brief, filed on August 1, 2001, petitioner explained that "[g]enerally, an adverse employment action is 'a materially adverse change in the terms and conditions of employment.' *Crady v. Liberty Natl. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993)."[9] Petitioner insisted that White had failed to offer sufficient evidence of "[t]he factors in proving a materially adverse change in the terms of employment",[10] repeatedly citing decisions from the Fifth, Eighth and Ninth Circuits, circuits which petitioner now insists have repudiated the materially-adverse standard.[11] In a brief filed on August 6, 2001, petitioner accused White of "tr[ying] to create a conflict among circuits where no clear conflict exists."[12] In its March 2003 brief before the en banc court, petitioner insisted:

> This Circuit has long held that an adverse employment action must be materially adverse. . . . The materiality standard enjoys wide support among the circuits, clearly representing the

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[7] Order Denying Defendant's Motion for Summary Judgment, p. 13.

[8] Memorandum in Support of Defendant's Motion for Judgment as a Matter of Law Or, In The Alternative, for New Trial, p. 2.

[9] Final First Brief of Appellant/Cross-Appellee, p. 11.

[10] *Id.*

[11] *Id.* at 14-21.

[12] Final Third Brief of Appellant/Cross-Appellee, p. 17.

> majority standard. . . . The materiality standard . . . requires actual, tangible consequences before allowing a lawsuit.[13]

Petitioner in this brief asserted that the Ninth Circuit's standard conflicted with the materially-adverse standard, but urged the Sixth Circuit to adhere to the materially-adverse standard.[14] The "ultimate employment decision" standard in the Fifth and Eighth Circuits, petitioner insisted, did not require a greater degree of harm. Those Fifth and Eighth Circuit decisions, petitioner explained, were "widely mischaracterized"; "[p]roperly understood" the degree of harm demanded by those two circuits was "simply the materiality standard."[15]

Petitioner suggested in this March 2003 brief that even a materially adverse retaliatory action might be lawful if it were in some sense "not complete."[16] For this contention petitioner did not rely on any Sixth Circuit precedent (other than the by-then vacated panel opinion), but instead on decisions in the Fifth and Eighth Circuits. This portion of the March 2003 brief might have been read as proposing a departure from a mere requirement of material adverseness, a change that might be relevant to the rescinded-dismissal retaliation in the instant case.

But two months later petitioner filed yet another brief, this time emphatically opposing any departure from the materially-adverse standard. In this final brief, filed in May 2003, petitioner expressly insisted that the en banc

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[13] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, pp. 12-13.

[14] *Id.* at 17-18.

[15] *Id.* at 14-15.

[16] *Id.* at 12-15.

court *could not* apply any standard different than the existing Sixth Circuit "materially adverse" rule. Responding to White's suggestions that the en banc court utilize the Ninth Circuit standard rather than the materially-adverse standard, petitioner objected:

> White is mistaken in asking the Court to apply a new test to her case. This case was tried under the Court's materially-adverse standard without objection. The jury verdict White obtained was under that standard. . . . Thus, whatever the Court may do for future cases, the judgment here must stand or fall on the materially adverse standard set out in Hollins v. Atlantic Co., 188 F.3d 652 (6th Cir. 1999).[FN1]
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> [FN1] See Moore v. Murphy, 47 F.3d 8, 11 (1st Cir. 1995) (unobjected to jury instructions became the law for the particular case).[17]

The Sixth Circuit en banc adhered to the materially-adverse standard, just as petitioner had urged. In applying the materially-adverse standard, the Sixth Circuit – unsurprisingly – indicated it was not adopting the Fifth Circuit's ultimate employment decision standard. But it did so only in the course of explaining why the en banc court was not following the reasoning of an earlier *Sixth Circuit* decision (Pet. App. 19a-21a), not because the court of appeals believed petitioner was urging that the ultimate employment decision standard should be adopted instead of the materially-adverse standard.[18]

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[17] Defendant/Appellant/Cross-Appellee's Reply Brief on Rehearing En Banc, p. 1.

[18] The portion of the opinion below under the heading "Defining Adverse Employment Action" refers only to the materially-adverse

(Continued on following page)

In sum, throughout more than four years of litigation in the courts below, petitioner embraced the Sixth Circuit's materially-adverse standard; only in its petition for certiorari does petitioner now assert that the materially-adverse standard is unsound and conflicts with the standards in the Fifth and Eighth Circuits. It is simply too late in the day to object to the materially-adverse standard for the first time.[19]

B. ANY DIFFERENCES AMONG THE STANDARDS IN THE COURTS OF APPEALS IS NOT DETERMINATIVE OF THE OUTCOME OF THIS CASE

Petitioner asserts that there is a difference between the Sixth Circuit's materially-adverse standard and the standard in the Ninth Circuit, which holds that a retaliatory action is unlawful if sufficiently serious to deter the filing of EEOC charges or other protected activity. See *Ray*

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standard and the Ninth Circuit standard, noting that White and the EEOC had urged the adoption of the latter. (Pet. App. 15a-18a). The court's discussion of the Fifth Circuit standard occurs under the heading "Suspension Without Pay," and contains no reference to any party having advocated adoption of that standard. (Pet. App. 19a-24a).

[19] Petitioner argues, in the alternative, that the Sixth Circuit misapplied the materially-adverse standard:

> Nominally, the Sixth Circuit's standard – that an "adverse employment action" occurs when an employee is subjected to "'a materially adverse change in the terms of her employment,'" Pet. App. 13a – mirrors the standard adopted by eight other circuits. In practice, however, it departs from decisions of some of those courts that employ the same terminology of "materially adverse change."

(Petition, pp. 14-15) (footnote omitted). But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

v. Henderson, 217 F.3d 1234 (9th Cir. 2000). This is not an appropriate case in which to resolve any such difference. The Ninth Circuit standard, to the extent that it differs in practice from the Sixth Circuit standard, is *less* favorable to petitioner. In the court of appeals, petitioner successfully argued *against* the Ninth Circuit standard,[20] and assuredly would do so here. Petitioner is not an appropriate party to litigate whether this Court should adopt the Ninth Circuit standard rather than the Sixth Circuit standard because it would lose under either standard.

Although petitioner now favors the Fifth Circuit "ultimate employment decision" standard, it has failed to demonstrate that it would prevail even if that standard were adopted. To the contrary, the harm caused by the retaliatory actions in the instant case – leading to a $43,250 jury verdict, the amount of which petitioner has not challenged – was sufficiently serious that those actions would be unlawful even in the Fifth Circuit.

The Fifth Circuit does not hold that all retaliatory job transfers are lawful. To the contrary, that circuit has repeatedly held that a retaliatory transfer *is* forbidden by Title VII where the differences in job duties are so substantial that the transfer amounts to a demotion. *Harper v. City of Jackson Municipal School Dist.*, 2005 WL 2404813 *8 (5th Cir. Sept. 30, 2005); *Sharp v. City of Houston*, 164 F.3d 923, 933 n.2 (5th Cir. 1999). In the instant case, the Sixth Circuit concluded, in light of the unique circumstances of this case, that removing White from her position as the forklift operator "[i]n essence . . . was a demotion." (Pet. App. 25a). The correctness of that fact-bound evaluation of the evidence simply does not warrant review by this Court.

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[20] Supplemental Brief of Defendant/Appellant/Cross-Appellee on Rehearing En Banc, pp. 17-19.

The Fifth Circuit's requirement that an adverse employment action be an "ultimate" employment decision is intended primarily to screen out actions (like a negative performance evaluation) that may in the future result in an action such as a dismissal. Petitioner has not identified any case in the Fifth Circuit holding that actions that ordinarily are ultimate employment decisions (e.g., dismissal, demotion, reduction in pay, denial of a promotion) would not be unlawful under Title VII if the employer later rescinded them. Petitioner insists that the rescinded dismissal in this case would not have been actionable in the Fifth Circuit (Pet. 16-17), but none of the three Fifth Circuit cases it cites involved the rescission of a discharge or even the rescission of an avowedly interim form of discipline.[21]

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[21] In *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir. 2002), the allegedly retaliatory action was the suspension of the plaintiff for 240 hours. It is unclear whether or not the plaintiff was paid during this suspension, which in any event was never rescinded. The court of appeals expressly did not decide whether the suspension constituted an ultimate employment decision. 308 F.3d 493.

In *Brazoria County, Texas v. EEOC*, 391 F.3d 685 (5th Cir. 2004), the retaliation took the form of ostracism by a county official. In holding that that was not actionable, the Fifth Circuit emphasized "that even courts that do not apply an 'ultimate employment decision' standard have rejected retaliation on the basis of ostracism. *E.g., Manatt v. Bank of America, NA*, 339 F.3d 792, 803 (9th Cir. 2003)." 391 F.3d at 693. The complaint also alleged that that county official had retaliated against the plaintiff, *after she resigned*, by writing a letter accusing her husband of theft. 391 F.3d at 692-93. That letter obviously had no affect whatsoever on the terms and conditions of the plaintiff's already terminated employment.

In *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir. 2003), the plaintiff alleged that, *after she had been fired*, the employer retaliated against her by filing a counterclaim in her federal employment discrimination case.

(Continued on following page)

II. THE FACT-BOUND DISPUTE IN THIS CASE REGARDING WHETHER THE RETALIATORY CONDUCT CONSTITUTED AN ADVERSE EMPLOYMENT ACTION DOES NOT PRESENT AN INTER-CIRCUIT CONFLICT WARRANTING REVIEW BY THIS COURT

Litigation about whether a particular retaliatory act is sufficiently serious to constitute an adverse employment action, and thus violate Title VII, presents intensely fact-bound disputes. Retaliatory acts come in infinite varieties, with innumerable types of differences in the actions of the defendants, the context of the work-site settings and rules within which they occur, and the impact on the victims. Although there are some differences in the terminology used in the lower courts to characterize the retaliatory acts that are of sufficient severity to be unlawful, in practice that terminology is far less important than the specific circumstances of each particular case.

Even the differences in the terminology utilized in the various courts of appeals are of limited scope and significance. Petitioner correctly acknowledges that nine circuits (including the Sixth Circuit) agree that a retaliatory action is unlawful if it results in "materially adverse" changes in the conditions of the victim's employment.

Petitioner argues that the Eighth Circuit rejects this majority standard, citing *Ledergerber v. Stangler*, 122 F.3d 1142 (8th Cir. 1997). (Pet. 12). But the "ultimate employment decision" standard certainly is not the law in the Eighth Circuit today, if indeed it ever was. The last decade of Eighth Circuit caselaw regarding what constitutes an

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In none of these cases did the alleged retaliation involve some form of rescinded or corrected retaliatory act.

adverse employment action in fact underscores the often semantic nature of this entire issue. Prior to *Ledergerber*, the standard applied in the Eighth Circuit was whether a change in working conditions caused a "materially significant disadvantage." *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The decision in *Ledergerber*, although using the phrase "ultimate employment decision," 122 F.3d at 1145, did not intend to alter the controlling Eighth Circuit standard; to the contrary, the opinion in *Ledergerber also* characterized the applicable standard as "materially significant disadvantage" (quoting *Harlston*), "materially adverse," "materially altered" and "material change." 122 F.3d at 1145. Clearly the panel in *Ledergerber* regarded all of these phrases, which included both the current Fifth and Sixth Circuit formulations, as synonymous. Shortly after *Ledergerber*, in *Manning v. Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997), the Eighth Circuit again treated "material employment disadvantage" and "ultimate employment decision" as articulating the same standard.[22] Two subsequent Eighth Circuit decisions stated that a plaintiff could prevail by showing either a "material employment disadvantage" *or* an "ultimate

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[22] 127 F.3d at 692:

> Absent some more tangible change in duties or working conditions that constituted a *material employment disadvantage*, we must agree with the district court that [the plaintiffs] did not present evidence sufficient to demonstrate any adverse employment action that constitutes the sort of *ultimate employment decision* intended to be actionable under Title VII.

(Emphasis added). In this passage, the Eighth Circuit explains, in effect, that the proof of a material employment disadvantage would *demonstrate* the existence of an ultimate employment decision.

employment decision."[23] The phrase "ultimate employment decision" has not been utilized in any Eighth Circuit retaliation case for several years. Several post-*Ledergerber* Eighth Circuit decisions use the Sixth Circuit's "materially adverse" formulation.[24] The most recent Eighth Circuit decisions utilize the phrase "material employment disadvantage."[25] There assuredly is no deep and intractable conflict, or even an intelligible distinction, between "material . . . disadvantage" and "materially adverse."

The decision below did disapprove the Ninth Circuit's formulation, which holds actionable any retaliatory act sufficiently serious to deter a reasonable person from engaging in protected activity. (Pet. App. 15a-19a; see *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)). But it is far from clear that this difference is more than merely semantic. Fear of a "materially adverse" change in working conditions would presumably be sufficient to reasonably deter protected conduct, while the prospect of a non-material change would be unlikely to do so. The Ninth Circuit decision announcing the deterrence standard insisted that that standard is essentially the same as the standards in the First, Seventh, Tenth, Eleventh and D.C. Circuits,[26] all of which petitioner (now) insists are quite

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[23] *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999); *Cross v. Cleaver*, 142 F.3d 1059, 1073 (8th Cir. 1998).

[24] *Saulsberry v. St. Mary's University of Minnesota*, 318 F.3d 862, 868 (8th Cir. 2003); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001); *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998).

[25] *Singletary v. Missouri Department of Corrections*, ___ F.3d ___, 2005 WL 2218039 (8th Cir. Sept. 14, 2005); *Davis v. KARK-TV, Inc.*, 421 F.3d 699, 706 (8th Cir. 2005); *Zhuang v. Datacard Corporation*, 414 F.3d 849 (8th Cir. 2005).

[26] *Ray v. Henderson*, 217 F.3d at 1241.

different from the Ninth Circuit standard. Both the Sixth and Ninth Circuits have explained that the purpose of their standards is to bar claims based on actions which are "trivial." *Compare* Pet. App. 10a, 16a *with Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). Like the Eighth Circuit, the Ninth Circuit at times uses a number of different alternative formulations interchangeably to characterize those retaliatory actions which are sufficiently adverse to be actionable. E.g., *James v. C-Tran*, 130 Fed. Appx. 156, 157 (9th Cir. 2005) (issue is whether retaliatory actions did or did not "materially impact [the plaintiff's] terms, conditions, or privileges of employment"); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 891 (11th Cir. 2002) ("whether a reasonable person in the same situation would view the [retaliatory] action as disadvantageous"). It is not at all clear in what circumstances (if any) the Ninth Circuit deterrence standard and the Sixth Circuit materially-adverse standard would actually yield different results. Those standards assuredly would lead to the same result in the instant case.

Petitioner is incorrect in asserting that the decision below conflicts with the decision of the Seventh Circuit in *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132 (7th Cir. 1993). The petition states that

> The Seventh Circuit has held that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities," and that a transfer to a new job with – as here – the same salary and benefits, and different but not less significant responsibilities, was not actionable. *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

(Petition, pp. 14-15). The last twenty-five words of this assertion, however, are not quoted from the Seventh Circuit decision in *Crady* itself, and do not accurately depict the holding of that case. The next sentence in *Crady* actually reads as follows:

> A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, *or other indices that might be unique to a particular situation.*

993 F.2d at 136 (emphasis added). This is precisely the formulation quoted and applied by the Sixth Circuit in this very case. (Pet. App. 13a (quoting *Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (quoting *Crady*)), 25a (applying the "indices . . . unique to [the] particularly situation" standard from *Kocsis* and *Crady*)).

That leaves only the Fifth Circuit's ultimate employment decision cases as a possible justification for a grant of certiorari. But petitioner has not established – indeed, has barely argued – that the serious injuries and types of retaliation involved in the instant case would not also be actionable in the Fifth Circuit. It is not sufficient that there are some differences in the articulated standards in the Fifth and Sixth Circuits. Despite such differences, those circuits in practice readily agree regarding the numerous cases that are either fairly serious or manifestly trivial. The question is not whether there is a conflict between the Fifth and Sixth Circuits regarding the lawfulness under Title VII of *some* retaliatory actions, but whether there is such a conflict regarding the legality of the particular actions in *this* case.

Petitioner does not contend that employers which want to retaliate against workers who file charges with the EEOC are entitled to a clear understanding of what types of retaliatory sanctions they can impose. And BNSF does not argue that it faces any administrative problem because it has to use different retaliatory practices in different circuits; to the contrary, BNSF of course does not claim to have a policy of retaliating against its employees.

Petitioner and several amici suggest that employers will be afraid to transfer or alter the duties of charging parties if such workplace changes could become elements of a retaliation claim. But they express no similar concern about judicial scrutiny of dismissals, demotions and promotions affecting charging parties, actions in which an employer often will have a far greater interest and which could give rise to significantly greater financial liability if found to be tainted by an unlawful retaliatory motive. Although these and most other employment decisions are sufficiently serious to be unlawful if motivated by a discriminatory or retaliatory purpose, that prospect has not inhibited the ability or willingness of employers to make such decisions on the basis of merit or other legitimate business interests. To be sure, the prospect that lower level managers might retaliate against charging parties (and that such retaliation could in turn result in a successful Title VII suit) might encourage higher officials to scrutinize adverse actions taken, as here, shortly after an employee filed a charge with EEOC or with the company's own personnel department. But that would be a wholly salutary consequence; the central purpose of monetary relief under Title VII is to provide "the spur or catalyst

which causes employers ... to self-examine and self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

III. THERE IS NO CONFLICT REGARDING THE STANDARD OF PROOF FOR AWARDING PUNITIVE DAMAGES UNDER TITLE VII

Petitioner does not claim that there is any inter-circuit conflict regarding the standard of proof for Title VII punitive damage awards. The other circuits that have expressly addressed this question agree with the Sixth Circuit that the elements of a punitive damage claim need only be proven by a preponderance of the evidence. In reaching that conclusion in *Karnes v. SCI Colorado Funeral Services, Inc.*, 162 F.3d 1077 (10th Cir. 1998), the Tenth Circuit commented that

> [the defendant] has not identified, nor have we found, any federal case applying the more stringent clear and convincing or beyond a reasonable doubt standards to punitive damages claims under Title VII.

162 F.3d at 1081. Similarly, the Fourth Circuit, in affirming the applicability of the preponderance of the evidence standard, emphasized that "[w]e are aware of no authority to the contrary." *Notter v. North Hand Protection*, 1996 WL 342008 *11 (4th Cir. June 21, 1996). The courts of appeals

in the Fifth,[27] Seventh,[28] Eighth,[29] Ninth[30] and Eleventh[31] Circuits have promulgated Model Jury Instructions for punitive damage claims that incorporate the preponderance of the evidence standard.

Petitioner states that the use of the preponderance of the evidence standard under Title VII "is contrary to the overwhelming trend in the states." (Petition, p. 24). But petitioner does not suggest the Sixth Circuit's interpretation of Title VII conflicts with a different interpretation of Title VII handed down by any state court of last resort. See Sup. Ct. Rule 10(a). None of the state cases referred to by the dissenting opinion below involved an interpretation of the standard of proof for an award of punitive damages under Title VII. For example, in 1992, the Tennessee Supreme Court announced what it acknowledged was a "modification" of the standard for awarding punitive damages under Tennessee statutory or common law claims, for the first time requiring proof by clear and convincing evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992); *id.* at 902 ("Our decision today substantially changes Tennessee law governing the availability of punitive damages."); see Pet. App. 76a. That

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[27] Fifth Circuit Pattern Jury Instructions Civil, pp. 29 (Instruction 3.1) and 208-09 (Instruction 15.13) (2005).

[28] Seventh Circuit Federal Jury Instructions Civil, pp. 90-92 (Instruction 3.13) (2005).

[29] Eighth Circuit Manual of Model Jury Instructions Civil, pp. 94-97 (Instruction 5.02C) (2005).

[30] Ninth Circuit Manual of Model Jury Instructions Civil, pp. 85-86 (Instruction 7.5) (2001).

[31] Eleventh Circuit Pattern Jury Instructions, Instruction 6.1, Supplemental Damages Instruction 2.1 (1999) (*reprinted in* Modern Federal Jury Instructions, Civil Pattern Instructions (LEXIS-NEXIS).

state court construction of Tennessee law obviously does not conflict with the Sixth Circuit's interpretation of a different law, the provision of the 1991 Civil Rights Act authorizing punitive damages in Title VII cases.

The only state "trend" consists either of recent state statutes that (unlike Title VII) have an express "clear and convincing" standard, or state judicial decisions interpreting *state* punitive damage statutes or common law remedies. The state courts themselves understand the difference between the standards applicable to federal claims and those applicable to state claims. In *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), the Colorado Supreme Court held that Title VII requires only proof by a preponderance of the evidence for an award of punitive damages, despite the fact that a Colorado statute required proof beyond a reasonable doubt in state law cases. 969 P.2d at 678-81.

The decision below assuredly is not "flatly incompatible with this Court's precedents." (Pet. 24). This Court has never decided that Title VII, or any other federal punitive damage statute, requires proof by clear and convincing evidence. To the contrary, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989), this Court held that "[c]onventional rules of civil litigation generally apply in Title VII cases . . . and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." In March 1991, this Court observed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), that

> [t]here is much to be said in favor of a State's requiring, as many do, see *e.g.*, Ohio Rev. Code Ann. § 2307.80 (Supp. 1989), a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," see Colo. Rev. Stat. § 13-25-127(2) (1987) as in the criminal context.

499 U.S. at 23 n.11. But this comment obviously did not constitute an interpretation of the punitive damage provision in the 1991 Civil Rights Act, which was not enacted until nine months later. If footnote 11 could be read as a suggestion that Congress should adopt language like that in the cited Ohio or Colorado statutes, it was a suggestion which Congress opted not to follow in fashioning the text of the 1991 Act.

Petitioner urges this Court to grant certiorari to hold that *all* federal statutes that authorize punitive damages require proof by clear and convincing evidence, unless the statute in question expressly provides for a lesser standard of proof. (Pet. 22).[32] Petitioner does not, however, suggest that this Court, any federal court of appeals, or any state court of last resort have ever adopted or (before the instant case) even considered any such rule of construction for federal statutes. Petitioner advanced no such argument in the Sixth Circuit; indeed, among the four briefs filed by petitioner in the court below, there is only a single seven-sentence paragraph, limited to the construction of Title VII, discussing the standard for punitive damages.[33] The dissenting opinion below is scholarly and provocative, but it also appears to be the first instance in which any appellate federal judge has advanced this argument. If in the fullness of time other courts of appeals are persuaded by the reasoning in that dissent, the resulting conflict might then warrant review by this Court. But that day has not yet arrived, and it may well never do so.

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[32] Such a rule would override the deliberate choice of Congress to require only in some statutes, but not in Title VII, that proof regarding punitive damages be by clear and convincing evidence. See 15 U.S.C. § 6604(a); 20 U.S.C. § 6736(c)(1); 42 U.S.C. § 14503(e)(1).

[33] Final Third Brief of Appellant/Cross-Appellee, p. 34.

Review at this time is particularly inappropriate because the instant litigation regarding punitive damages is far from final. The district court has been instructed on remand first to decide whether White has offered sufficient evidence to support an award of punitive damages under the correct legal standard; if BNSF prevails on that issue, punitive damages will be denied. Even if a trial is held on this issue, the jury may conclude that White has not proved by a preponderance of the evidence that punitive damages should be awarded. If BNSF is successful on either of these issues, any appeal (by White) from that final judgment will no longer raise any issue about the appropriate burden for obtaining punitive damages in a Title VII case.

The petition also argues that, if a new trial on punitive damages is to be held, the jury should be directed to re-decide as well the merits of White's retaliation claim. (Pet. 25). Petitioner contends that in the particular circumstances of this case the order of the Sixth Circuit is inconsistent with the decision of this Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), and the Fifth Circuit's decision in *Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000). But neither *Gasoline Products* nor *Hardin* hold that a separate trial on punitive damages only is never permissible. *Gasoline Products* actually concerned whether a separate trial could be held on *compensatory* damages only; it held that such trials are indeed permissible if "a trial of it alone may be had without injustice." 283 U.S. at 500. *Hardin* expressly held that trials of punitive damages only *are* permissible, although not in the circumstances of that case.[34] This

[34] 227 F.3d at 272-73:

> We are persuaded of the practical inseparability of the issues of intent, of damages for emotional injury, and of punitive damages *in this case*, a conclusion we can and do reach without deciding

(Continued on following page)

aspect of the second question presented thus raises only a fact-bound dispute about the appropriateness of a punitive-damages-only trial under the particular circumstances of this case. And, like the dispute about the standard of proof, there is not yet a final determination that a retrial regarding punitive damages will actually be held.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

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that they are inseparable as a matter of law across all cases; and we do not suggest that punitive damages may not walk alone in other contexts. See *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 582 F.2d 984 (5th Cir. 1978).

(Emphasis added). The court of appeals in *Black* directed a retrial on punitive damages only. 582 F.2d at 991.